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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-214

ANDREW CHINARIAN,

Petitioner,

v

WILLIAM RUCKS, Warden of the
Detroit House of Corrections,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinions below are adequately set forth in the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

WHETHER PETITIONER WAS DEPRIVED OF ANY CONSTITUTIONAL RIGHTS WHEN, DESPITE SOME PRETRIAL PUBLICITY, THE STATE TRIAL COURT EXERCISED ITS DISCRETION AND DENIED A CHANGE OF VENUE IN ORDER TO ATTEMPT TO IMPANEL AN IMPARTIAL JURY.

STATUTES INVOLVED

The Statutes involved, being MCLA 752.861; MSA 28.436(21) and MCLA 762.7; MSA 28.850, are adequately set forth in the petition.

STATEMENT OF THE CASE

The shooting which led to Petitioner's conviction for reckless discharge of a firearm resulting in death occurred on July 28, 1975. The order denying Petitioner's motion for change of venue was entered on December 5, 1975 in Recorder's Court for the city of Detroit. The *voir dire* of potential jurors commenced on January 12, 1976 and concluded on January 21, 1976. After examining the transcript of the *voir dire*, the United States magistrate concluded in his Report and Recommendation dated August 31, 1978 that "the trial judge, together with extremely able trial counsel, conducted the *voir dire* in a commendable manner so as to insure the selection and impaneling of an unbiased jury capable of basing its verdict solely on the evidence introduced at the trial." Respondent believes that the following circumstances surrounding the *voir dire* are important in evaluating the allegations of prejudicial pretrial publicity.

Approximately 66 potential jurors were examined by counsel. After 17 potential jurors had been excused for cause, counsel were permitted to exercise their peremptory challenges. Both the prosecution and defense counsel exercised all of their peremptory challenges. Although the Petition at Page 21 states that the defense was "forced" to exhaust its peremptory challenges, the record clearly reveals that prior to the commencement of *voir dire* defense counsel had stated his intention to exercise all 20 peremptory challenges. Concerning the potential jurors who were successfully challenged for cause, there were various bases for the challenges, but by far the most

prevalent cause dealt not with opinions due to pretrial publicity but with the potential jurors' difficulty in accepting the idea that an individual can use fatal force in protecting property.

The transcript of the *voir dire* comprises approximately 900 pages. The record indicates that both the prosecution and the defense counsel were given virtually unlimited freedom to examine potential jurors as to possible prejudice, but that no unshakeable preformed opinions were discovered. For example, juror Arvella Griffon stated that while she had heard of Petitioner on the news she didn't pay too much attention to it and had no opinion at the time of the incident whether Petitioner was right or wrong and had no such opinion at the time of trial. Juror Harry Terrell stated that he had heard of Petitioner, but that he did not fully remember the incident. Although he acknowledged that the newspapers had reported that the civil disturbance in the City of Detroit had been caused by this shooting, he personally did not conclude that. He agreed to decide the case totally on the evidence adduced at the trial. Juror Zena Ealavega stated that she had been out of town at the time of the incident and although she had heard of the civil disturbance, she had never heard of the victim or the Petitioner before the trial and that she had not formed any opinion as to whether Petitioner was right or wrong. Barbara Merritt had never heard of either the victim or Petitioner Chinarian and although she had heard there was a killing, she did not know anything about the participants or the circumstances.

Juror John Cowall stated that although he had heard of the Defendant in connection with the incident, he agreed to decide the case solely on the facts adduced at trial and said that it would not be so hard to desregard what he heard on television or read in the newspapers several months previously. Ernest Noble was aware of the disturbance through radio,

newspapers and television coverage, but he had not discussed the incident and had no opinion one way or another. Debra Fisher knew of the civil disturbance, but only "very little" and she did not recall anything about the shooting. Marietta Ray had heard of the disturbance, but only by word of mouth, not through the media, and she did not recall hearing about the shooting. Mary Tucker had read about the civil disturbance in the papers, but stated that it was hard to remember at the time of the trial. She stated that her memory was very faint about the incident. Neil Plourde stated that he heard of Petitioner in connection with the incident, but that it was "qiute some time back." He "faintly" recalled some TV coverage on the incident, but did not remember details. He stated that although he was aware of the incident, he had not formed an opinion, in part because of his mistrust of the media: "I've been living long enough to know that a good deal of information that comes out of the newspapers and quite a lot that comes over television is either pretty bias or completely misrepresents the truth and that's the way it is."

Linda Reid had heard of the incident on the news, but had no feeling about the case at the time and although she heard one news broadcast, she hadn't thought about it any more since then. Cynthia Layton stated that she had been in the hospital at the time of the incident and although she had read Petitioner's name in the papers and vaguely recalled a shooting and disturbance, she did not recall the reason for the shooting or the surrounding circumstances. Although she had seen newspaper articles, she stated that she did not believe everything she read in the newspapers. Nicolas Manula stated that he had read "a little bit" in the paper when the incident occurred, but that he didn't take too much interest in it or pay too much attention to it. He stated that he had no prior feeling about the case, no opinion about who was right or wrong, and that he would decide the case solely on the evidence presented at trial. John Pieprzyk stated that although

he had heard of the shooting on the TV and newspapers, he did not really remember much and that it was no "big thing." He further stated that he had no strong feelings about the case.

In his petition to this Court, Petitioner relies heavily on a public opinion survey which he commissioned, the results of which were presented by testimony at the state court evidentiary hearings on the motion for change of venue. The telephone poll was taken approximately two months before trial and did not involve any persons chosen as prospective jurors. Testimony concerning the poll indicated that 85% of the people were aware of the case. Petitioner asserts at page 19 of his petition that over 36% of these people had a preconceived notion on the issue of guilt. Petitioner neglects to state that this figure was equally divided between those who held an opinion that Petitioner was guilty and those who felt he was not guilty. Approximately 66% of those who said "guilty" stated that they would not change their opinion while 64% of those polled who stated "not guilty" would not change their opinion. The state trial court, after hearing all the evidence presented in support of the motion for pre-*voir dire* change of venue, concluded that the evidence did not demonstrate a need for change of venue. As has been stated, the liberal *voir dire* which followed approximately one month after denial of change of venue gave counsel the opportunity to expose any prejudice in potential jurors.

ARGUMENT

I.

THIS CASE PRESENTS NO IMPORTANT QUESTIONS OF FEDERAL LAW WHICH MUST BE SETTLED BY THIS COURT.

The 6th Amendment right to an impartial jury is, of course, of profound importance in any criminal trial. However, under the circumstances of this case, there is no legal issue presented which requires action by this Court. Petitioner claims no error in the trial itself; he asserts only that a denial of due process occurred because of the state trial court's failure to grant a change of venue prior to the *voir dire* of potential jurors. Petitioner claims that pretrial publicity was so extensive that community prejudice should be presumed. As has been stated, examination of the extensive transcript of the *voir dire* proceedings does not provide any basis in fact for Petitioner's contention.

The legal principles to be applied in evaluating claims of prejudicial pretrial publicity were dispositively settled by this Court in *Murphy* v *Florida*, 421 US 794; 95 S Ct 2031; 44 L Ed 2d 589 (1975). This Court there affirmed the denial of habeas corpus relief to a petitioner who alleged denial of a fair trial because members of the jury had learned from news accounts about a prior felony conviction and certain facts about the crime with which he was charged. The Court resolved that case by the application of a standard requiring examination of the totality of circumstances, including the testimony on *voir dire*, for a determination as to whether the trial was fundamentally fair.

Again in *Dobbert* v *Florida*, 432 US 282; 97 S Ct 2290; 53 L Ed 2d 344 (1977) this Court revisited the issue of prejudicial

pretrial publicity and rejected the argument of the petitioner that bias in the jurors should be presumed because of the extensive nature of media coverage. In *Dobbert*, this Court noted that the petitioner had directed it "to no specific portions of the record, in particular the *voir dire* examination of the jurors, which would require a finding of constitutional unfairness as to the method of jury selection or as to the character of the jurors actually selected." 432 US at 303. Likewise, in this case there are no references to the *voir dire* record to document Petitioner's claim of prejudice.

It is apparent from the opinions below that the District Court and the Court of Appeals applied the standards of *Murphy* and *Dobbert* in evaluating and resolving Petitioner's allegation of prejudicial pretrial publicity. Since the correct legal principles were applied, it is clear that the outcome of this case must turn solely upon the specific facts demonstrated by the totality of circumstances and that a decision by this Court would affect few persons, if any, other than the litigants themselves.

Petitioner is, in effect, attempting to appeal from the factual determinations made by all the courts which have previously considered the issue and determined that Petitioner's trial was fundamentally fair. The legal issue presented by this case—the correct standard to be applied in evaluating this 6th Amendment claim—was dispositively settled by this Court in *Murphy* v *Florida, supra*, whose standard was reiterated in *Dobbert* v *Florida, supra*. This case presents no important unsettled questions of federal law requiring consideration by this Court. Further, as will be seen herein by the discussion under argument II, the factual determination that Petitioner received a fair trial is clearly supported by the record.

II.

THE DECISION BELOW IS CLEARLY CORRECT

At the evidentiary hearings on Petitioner's motion for change of venue, Petitioner introduced extensive evidence of media coverage including newspaper clippings and other publicity. Testimony was also received concerning a public opinion poll purporting to portray community attitudes. The trial court declined to change venue pending *voir dire* examination of prospective jurors, and in so doing followed approved practice of longstanding under Michigan law. *People* v *Swift*, 172 Mich 473; 138 NW 662 (1912).

Respondent submits that most of the evidence submitted by Petitioner during the hearings on his motion for change of venue is composed of straightforward factual reporting "rather than invidious articles which would tend to arouse ill will and vindictiveness." *Beck* v *Washington*, 369 US 541, 556; 82 S Ct 955; 8 L Ed 2d 98 (1962). Furthermore, both the District Court and the Court of Appeals observed that Petitioner's trial was not held until after six months had elapsed. This lapse of time permitted dissipation of any emotional fervor which might have been created by the pretrial publicity and, when coupled with the skepticism of the media expressed by some of the jurors (see Respondent's Statement of the Case, supra), indicates that Petitioner's trial was not conducted in an atmosphere that had been "utterly corrupted by press coverage." *Murphy* v *Florida, supra*, 421 US at 798.

Michigan law allows a change of venue whenever good cause is shown. MCLA 762.7; MSA 28.850. Michigan law also allows a judge to determine whether an impartial jury can in fact be impaneled before making a final decision on change of venue. *People* v *Swift, supra.* However, contrary to the

statement at page 10 of the petition for writ of certiorari, it is not mandatory under Michigan law that a judge conduct *voir dire* of potential jurors before making a final determination of a motion to change venue. The procedure followed in the instant case was not mandatory, but rather is permitted when a judge in his discretion feels that it is warranted.

If the procedure followed in the instant case of denying a change of venue pending an attempt to impanel an impartial jury were constitutionally defective, one wonders why this Court would have articulated its totality of the circumstances approach in *Murphy* and in *Dobbert, supra.* Each of those cases examined among other factors the transcript of the *voir dire* proceedings. In this regard, it is noteworthy that Petitioner here does not even attempt to demonstrate actual juror prejudice by reference to any portion of the approximately 900-page transcript of the *voir dire* proceedings. Respondent submits that actual juror prejudice cannot be demonstrated because it did not exist, and that in the words of the United States magistrate, adopted by the District Court below, "the trial judge, together with extremely able trial counsel, conducted the *voir dire* in a commendable manner so as to insure the selection and impaneling of an unbiased jury capable of basing its verdict solely on the evidence introduced at trial."

III.

THE DECISION BELOW IS NOT IN CONFLICT WITH OTHER DECISIONS.

The Michigan procedures utilized in Petitioner's trial comport with the standard enunciated in *Murphy* v *Florida, supra,* that the totality of circumstances must be examined for indications that the trial was not fundamentally fair and that the burden is on the criminal defendant to demonstrate "the ac-

tual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." 421 US at 800. In addition to correctly concluding that no actual prejudice had been shown, the courts below also correctly evaluated and rejected Petitioner's claim that the general community atmosphere was sufficiently inflamed to require disregarding the other "indicia of impartiality" appearing from the record. *Murphy* v *Florida, supra*, at 802. Thus, all courts that have considered Petitioner's contention have followed the procedure mandated by this Court—to carefully consider the total record for indications of unfairness—and have reached the identical conclusion that the facts demonstrate a fundamentally fair trial with no deprivation of due process.

Irvin v *Dowd*, 366 US 717; 81 S Ct 1639; 6 L Ed 2d 751 (1961) which Petitioner cites is factually distinguishable from the instant case. There the defendant was tried and convicted for one of a series of recent murders in Indiana. There had been massive unfavorable publicity and one change of venue was granted to a nearby county. Almost 90% of the 370 prospective jurors questioned had some opinion as to the guilt of the accused and 8 of the 12 chosen thought he was guilty. On this record, the Court properly concluded that actual prejudice from the massive pretrial publicity had been demonstrated and that lower court determinations of impartiality simply did not meet constitutional standards.

Similarly, the facts of *Sheppard* v *Maxwell*, 384 US 333; 86 S Ct 1507; 16 L Ed 2d 600 (1966) indicated that the massive publicity surrounding that prosecution actually infected the trial proceedings. There this Court held that the trial court had failed to protect the defendant from inherently prejudicial publicity both before and during the trial and that this failure resulted in a denial of due process. This Court stated that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should con-

tinue the case until the threat abates, or transfer it to another county not so permeated with publicity." 384 US at 363. In the instant case, the publicity of which Petitioner complains did not approach the level of virulence found in *Sheppard* and, in addition, Petitioner recevied the benefit of several months delay during which any prejudice caused by news coverage had time to dissipate. Both the District Court and the Court of Appeals below noted this lapse of time, in addition to Petitioner's failure to demonstrate any actual prejudice from the record, in concluding that Petitioner received a fair trial.

Estes v *Texas*, 381 US 532; 85 S Ct 1628; 14 L Ed 2d 543 (1965) and *Turner* v *Louisiana*, 379 US 466; 85 S Ct 546; 13 L Ed 2d 424 (1965) were each decided on the basis of their particular facts and do not furnish support for Petitioner's contention. In *Estes*, the press actually intruded into the trial process resulting in a circus atmosphere which vitiated the judicial serenity and calm to which an accused is entitled. In *Turner*, two deputy sheriffs who were prosecution witnesses were in continuous and intimate association with the jurors during the trial. The inherently suspect circumstances which existed in *Estes* and *Turner* have no relation to the instant case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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